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IN THE SUPREME COURT OF THE UNITED STATES

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 MARCUS D. MIMS, :
 Petitioner :
 v. : No. 10-1195
 ARROW FINANCIAL SERVICES, LLC :
 - - - - - x

Washington, D.C.
 Monday, November 28, 2011

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 11:04 a.m.

APPEARANCES:
 SCOTT L. NELSON, ESQ., Washington, D.C.; on behalf of
 Petitioner.
 GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of
 Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 10-1195, Mims v. Arrow Financial Services.

Mr. Nelson.

ORAL ARGUMENT OF SCOTT L. NELSON

ON BEHALF OF THE PETITIONER

MR. NELSON: Mr. Chief Justice, and may it please the Court:

The Federal question jurisdiction statute, 28 U.S.C. section 1331, broadly grants Federal courts jurisdiction over all actions arising under Federal law unless Congress has provided otherwise. That grant of jurisdiction encompasses rights of action that are created and governed by substantive Federal law.

The Telephone Consumer Protection Act sets forth such a right of action. It provides detailed substantive standards and it grants a private right of action to recover for their violation. The TCPA permits that action to be filed in a State court if the State court allows such action, but it says nothing one way or another about whether the action may also be filed in Federal court.

JUSTICE KAGAN: Mr. Nelson, do you think

1 that there is a clear statement rule that applies when
2 Congress attempts to divest a Federal court of
3 jurisdiction over claims of this kind?

4 MR. NELSON: Well, sometimes the Court
5 has -- has talked about clear statement rules in terms
6 like "Congress must make unmistakably plain." I'm not
7 sure it rises to that level, but what the Court has said
8 is that jurisdiction granted by statute exists unless
9 Congress has affirmatively displaced it, and that the
10 Court is unwilling to -- to defeat jurisdiction by mere
11 implication.

12 So I think it -- it may be something a
13 little less than -- than what this Court has sometimes
14 referred to as a clear statement rule, but it is a
15 requirement that Congress act --

16 JUSTICE SCALIA: Do you have anything more
17 than implication here?

18 MR. NELSON: No. There -- there is not even
19 implication here, Justice Scalia. There is -- there
20 is -- there is really nothing at all.

21 CHIEF JUSTICE ROBERTS: You -- you'd have --
22 the same private right of action could be brought in
23 State court without subsection 5 at all, right?

24 MR. NELSON: I -- I think that's very
25 likely, Your Honor. I mean, under -- under Tafflin, and

1 going back to the -- to over a century ago in Claflin,
2 there is a presumption that jurisdiction over a
3 transitory cause of action created by Federal law exists
4 in State courts. But as the Court pointed out in
5 Tafflin, that -- that presumption has sometimes, as in
6 the antitrust cases, been found to have been displaced
7 by implication from Federal policy.

8 CHIEF JUSTICE ROBERTS: What is the basis --
9 you assert that you could bring this -- bring a Federal
10 cause of action in Federal court.

11 MR. NELSON: Pardon me?

12 CHIEF JUSTICE ROBERTS: You think that you
13 can bring the Federal cause of action in Federal court.

14 MR. NELSON: Yes. I --

15 CHIEF JUSTICE ROBERTS: What is -- what is
16 the basis for -- putting aside jurisdiction, what is the
17 basis for the Federal cause of action?

18 MR. NELSON: Oh, you mean the existence of
19 the cause of action at all?

20 CHIEF JUSTICE ROBERTS: Yes. Yes.

21 MR. NELSON: I mean -- the -- you know, what
22 this Court has -- has, I think, said in its
23 interpretation of statutes is that where a statute
24 creates a right of recovery from A to B in a court under
25 circumstances Y, that is a right of action. And the --

1 CHIEF JUSTICE ROBERTS: But we -- we said
2 that 40 years ago. More recently, we have said that
3 Congress must be fairly express in creating a private
4 cause of action. And my -- my concern is if you put it
5 against that context, that our cases require fairly
6 direct evidence, express evidence that Congress meant to
7 give a private right of action, in that context the
8 existence of an express State cause of action or a
9 Federal cause of action that can only be brought in
10 State court, the implication that there isn't one that
11 can be brought on its own in Federal court is fairly
12 strong.

13 MR. NELSON: Well, I think that's not
14 correct. I think, Your Honor, that that is actually
15 confusing the concept of whether there is a right of
16 action, which is a substantive right of recovery that
17 can be pursued in a court, and the question of
18 jurisdiction, which is in what court may that be
19 brought.

20 CHIEF JUSTICE ROBERTS: Well, that -- I
21 understand that -- that proposition. Assuming that
22 distinction is correct, and that there is no
23 free-standing Federal cause of action, what good does
24 having Federal jurisdiction give you?

25 MR. NELSON: Well --

1 CHIEF JUSTICE ROBERTS: Because I take it
2 that at that point everybody can immediately --
3 defendants can remove -- oh, cross that off.

4 What benefit do you have if as soon as you
5 file your action, everybody says, congratulations, you
6 have Federal jurisdiction, and you are kicked out of
7 court because you have no cause of action?

8 MR. NELSON: Well, what I'm saying, Your
9 Honor, is that it is not in fact the case that there is
10 no right of action.

11 CHIEF JUSTICE ROBERTS: No, no. I am
12 assuming that you don't see a cause of action.

13 MR. NELSON: If there were no right of
14 action that -- that is available somehow in Federal
15 court, then of course it does no good to be in Federal
16 court. But that's not how the Court has -- has treated
17 rights of action. Limitations on the court in which a
18 right of action can be brought are not part of the right
19 of action. They are matters of jurisdiction.

20 JUSTICE ALITO: Can Congress create a cause
21 of action that does not arise under Federal law.

22 MR. NELSON: No I don't really think it can.
23 Congress doesn't have the power to enact State law. So
24 if Congress creates a cause of action and establishes
25 Federal law that governs it, that is necessarily a cause

1 of action that arises under Federal law.

2 JUSTICE ALITO: And there is no dispute that
3 there is a cause of action here that was created by
4 Congress, isn't that right?

5 MR. NELSON: Yes, that -- that's correct.
6 This is not an implied right of action. It's an express
7 right of action. Congress said in 227(b)(3) that if
8 this right is violated you can recover X amount, \$500
9 per violation or up to three times that much in the case
10 of a willful violation. And the question is simply
11 whether by saying that it may be filed in State court
12 the court has -- that Congress has displaced the
13 jurisdiction that would otherwise be available.

14 JUSTICE BREYER: So the basic reason seemed
15 to me that it might be -- following up on the Chief
16 Justice here, who withdrew the interesting part of his
17 question. The Congress seemed to want to have ordinary
18 people to be able to go into small claims court in a
19 State and bring an action for \$500 because they were
20 pestered by these salesmen on the phone in violation of
21 the act.

22 Now, if you are right they could go into
23 Federal court. So could the defense. And so any case
24 they bring in small claims court I guess could be
25 removed, couldn't it? And how is that -- am I right

1 about that.

2 MR. NELSON: It's theoretically possible
3 that it could be removed, Justice Breyer, yes.

4 JUSTICE BREYER: Well, why wouldn't they --
5 I mean, if they are really pests -- I'm not saying they
6 are all pests; some might be. But if they are pests and
7 they want to drag it out, what they do is they just
8 remove it from small claims court. They tell their
9 lawyer: Remove everything, remove everything. And so
10 what was Congress's objective, seemingly to provide a
11 simple, clear, easy thing for the average American to do
12 when he's pestered, suddenly becomes a major legal
13 problem since the defense lawyer is instructed, remove
14 every case to Federal court. Now, that's something
15 that's bothering me, so I would like to know what your
16 response is.

17 MR. NELSON: Yes, Justice Breyer. There are
18 several -- several parts of the answer. The first is
19 that -- that the strategy itself is self-defeating. If
20 you have a \$500 claim being brought by an individual in
21 a small claims court to pay a lawyer, to pay the filing
22 fee to remove it --

23 JUSTICE BREYER: Oh, it's not
24 self-defeating, because we keep it up and the word will
25 get around. And in case, by the way, anyone doubts it,

1 before he even files -- one of the things that we
2 instruct our salesmen to say is: If you sue us, we are
3 going to remove it. You know, there are many ways of it
4 getting around.

5 MR. NELSON: Well, Justice Breyer --

6 JUSTICE BREYER: Okay, what's the second?

7 MR. NELSON: To begin with, now I want to --
8 I want to -- I want to stay on this one before I go on
9 to the next one. The -- the reason that that strategy
10 doesn't really work with respect to individual
11 plaintiffs filing in small claims court is they are not
12 necessarily, in fact they are most likely not going to
13 be repeat players, so they don't have any real way to
14 find out about it, absent the telemarketer telling them
15 in the phone call that you have a right of action, which
16 seems even more unlikely.

17 JUSTICE KENNEDY: I'm not sure I am
18 understanding your answer, because I have one of the
19 same problems as Justice Breyer. Let -- the design of
20 this statute from what I can infer, what the
21 congressional intent was, is for an individual person to
22 be able to go into small claims court and the defendant
23 will usually be the telephone company that wants to
24 remove it to Federal court. And as Justice Breyer said,
25 instruct the attorneys to always go to Federal court;

1 the word will get out. And you are saying: Oh, don't
2 worry about that; that won't happen. That will happen.
3 That's exactly what's going to happen.

4 MR. NELSON: Justice Kennedy, I think that
5 word getting out is very unlikely to happen if you're
6 talking about t individual, uncounseled --

7 JUSTICE KENNEDY: Whether the word gets out
8 or not, they will all go to Federal court.

9 MR. NELSON: But -- and I'd also --

10 JUSTICE GINSBURG: Do we have any
11 information on the -- I mean, there are small claims
12 courts in State courts. Is there any practice of
13 removing \$500 claims and paying much more than the \$500
14 that's at stake?

15 MR. NELSON: No. No, Justice Ginsburg, and
16 that was the second part of the answer --

17 JUSTICE BREYER: Yes, but is there any
18 reason to think before you brought this suit that people
19 thought they could remove it to Federal court?

20 MR. NELSON: Well, in fact in the Seventh
21 Circuit defendants have been aware for the past 6 years,
22 I believe, that they can remove these claims to Federal
23 court. And the ones that have been removed are large
24 class actions.

25 JUSTICE GINSBURG: In this -- in this case

1 couldn't -- could this case have been brought in a small
2 claims court? Where does it come from?

3 MR. NELSON: It comes from Florida, Your
4 Honor. It could not have been brought in small claims
5 court for two reasons. The complaint on its face
6 alleges 12 calls and more, and at the -- at the \$1,500,
7 trebled, the 500 trebled, that would far exceed the \$500
8 jurisdictional limit of a Florida small claims court.

9 The action also seeks injunctive relief,
10 which is not available.

11 JUSTICE BREYER: All right. Aside from the
12 individual ones, what's actually worrying me, which I've
13 tried to bring out, is I am pretty certain Congress in
14 this statute was trying to protect the average person
15 who can't afford a lawyer who is pestered with these
16 calls. That's their object.

17 And I can think that if you can bring this
18 suit in Federal court, so can the defendants. And
19 therefore I think, gee, I'm not so sure about this.
20 They don't gain much advantage, the plaintiffs, by being
21 about to go into Federal court, and there could be some
22 advantage on the defense side to making things more
23 complex, raising legal fees, okay?

24 So that's where I am at this moment. Now,
25 I'm asking you this because I would like your best

1 answer to disabuse me of this notion which cuts against
2 your case.

3 MR. NELSON: Well I think -- I think the
4 further thing that cuts against it, Justice Breyer, is
5 you've received three amicus briefs on the other side
6 from people who participate in the industry, and what
7 they all say repeatedly is that there are tremendous
8 benefits to both plaintiffs and defendants to being in
9 small claims court in the truly small claims.

10 The defendant -- you know, if the defendant
11 removes, it's the defendant that is going to be racking
12 up the legal fees, not the pro se small claims
13 plaintiff.

14 CHIEF JUSTICE ROBERTS: Why is that?
15 Wouldn't the -- I think you are fighting
16 Justice Breyer's hypothetical. Wouldn't the -- I can
17 imagine if you've got a small claim type case because
18 you got the -- one of these calls, and the first thing
19 you get is the notice of removal and this. I mean,
20 you're going to say: Forget about it, I'm not going to
21 hire a lawyer, right? I mean, the idea is they would
22 drop it right away.

23 MR. NELSON: Well, the experience is, I
24 think -- and there is an interesting article in a
25 publication called the Consumer Finance Law Quarterly

1 Report from the spring of 2002 called "Defending TCPA
2 Actions in San Diego Small Claims Court."

3 And there are some repeat players on the
4 plaintiff's side in small claims court, and the advice
5 that the author gives is: Whatever you do, don't try to
6 escalate with those people; don't even remove it up to
7 the State court of general jurisdiction, because you are
8 just going to find yourself in a morass; it's going to
9 cost you the defendant much more money to move this
10 claim out of small claims court.

11 JUSTICE GINSBURG: Could these claims be
12 brought in State court as class actions?

13 MR. NELSON: Well, that depends, Justice
14 Ginsburg, on the State. As the Court probably may
15 recall, in the State of New York you probably couldn't
16 bring this action as a class action because of --

17 JUSTICE GINSBURG: But you could remove it
18 to the Federal courts and then you could.

19 MR. NELSON: Right. In Federal court I
20 think that -- although there's actually some
21 disagreement among the courts of appeals on this point
22 between the Second and Third Circuits over whether State
23 procedural law would apply in Federal court. We think
24 the best answer is Federal procedural law applies when
25 the claim is brought in Federal court. Then in some

1 states there has been a recent decision in New Jersey
2 where a New Jersey court said that a class action was
3 not superior for bringing this.

4 JUSTICE GINSBURG: But it's up to -- it's up
5 to the State.

6 MR. NELSON: It's up to the State if it's
7 brought in State court, Your Honor.

8 JUSTICE GINSBURG: Congress said: You bring
9 it according to your law and your rules of procedure.
10 So the State could make it -- Congress may have been
11 interested in the small claims court, but it certainly
12 didn't limit the States to bringing -- to putting these
13 claims in small claims court.

14 MR. NELSON: No. And -- and in fact, number
15 one, it -- it probably couldn't. Number two, the -- you
16 know, the statute creates rights to recovery and a right
17 to injunctive relief. That's actually the first listed
18 claim for relief that the private right of action gives
19 you. That is -- you know, injunctive relief claims are
20 virtually by definition beyond the scope of -- of
21 jurisdiction of small claims courts. So it created a
22 right of action that in some instances would be
23 appropriate for small claims court.

24 And I think the incentives are that -- that
25 those that are really truly small claims court matters,

1 they'll be brought there, they'll stay there. Those
2 that are not, cases where it's worth litigating in
3 Federal court, or worth litigating in a State court of
4 general jurisdiction, and claims that may be possibly
5 suitable for class action status will be brought in
6 other types of courts. That's a --

7 JUSTICE KAGAN: Mr. Nelson, it's -- it's an
8 odd provision, this little clause, "if otherwise
9 permitted by the laws or a court of a State." What --
10 what is your account of that provision and what it's
11 doing here?

12 MR. NELSON: Well, I think -- I think what
13 it does is -- is principally, it displaces what would
14 otherwise be the rule of *Testa v. Katt*, that --

15 JUSTICE KAGAN: And -- and why did Congress
16 want to do that? I mean, you would think -- and this
17 goes back to Justice Breyer's point -- you know, most of
18 these claims, they're small claims, they typically are
19 better situated in a State's small claims court, and yet
20 here Congress says: Well, the State doesn't have to
21 entertain these, in which case they could only be
22 brought in Federal court.

23 MR. NELSON: Well, it's not clear that it
24 means -- you know, how much freedom it gives them not to
25 entertain them. It -- it may -- and again, you know,

1 that's an issue that the -- that the State supreme
2 courts are divided on, although it's a theoretical
3 division at this point because no State has actually
4 precluded these claims at this stage.

5 But, you know, I think that, especially read
6 against the backdrop of the general principle that,
7 while States can't discriminate against Federal rights
8 of action, they are also not required to create courts
9 that have jurisdiction over them, that what this statute
10 was intended to do was -- was recognize the flexibility
11 that the courts would have to define which courts and
12 under which procedures it would entertain these actions.

13 JUSTICE ALITO: Well, if the State thought
14 that its courts were just being overwhelmed by these
15 cases, even the small claims courts, that there were so
16 many of them, would they be permitted to bar them
17 completely?

18 MR. NELSON: That's a possible reading of
19 the statute, Justice Alito. That's what the Texas
20 Supreme Court has held. In fact, the Texas Supreme
21 Court has held that the State has to affirmatively
22 authorize them. Other State supreme courts have said
23 that what it means by "if otherwise permitted" is if
24 there is a court of general jurisdiction that hears
25 cases like this and we haven't affirmatively excluded

1 them. And then some State supreme courts such as
2 Illinois have said, we don't even have the power to
3 exclude them. But I -- you know, that is one of the
4 readings of the statute.

5 But -- but what's clear is that the "if
6 otherwise permitted" does mean -- mean something. It --
7 it provides a statutory standard for when the action may
8 be brought in a State court, which is a matter of --
9 it's certainly not superfluous.

10 CHIEF JUSTICE ROBERTS: But is it just when
11 the action can be brought in State court or when the
12 action can be brought at all? It says you may bring an
13 action, and that's what I understood your basis for the
14 Federal cause of action to be, if it is permitted by the
15 law and rules of a court of that State.

16 MR. NELSON: Well, I think what it says is
17 "may," "may bring an action in the courts of that State
18 if otherwise permitted." And I think if you think about
19 what the -- what reason Congress would have to put "if
20 otherwise permitted by State laws or rules of court,"
21 it's very unlikely that it would use that phrase to
22 denote when you have a right of action in Federal
23 court --

24 CHIEF JUSTICE ROBERTS: What you can
25 always --

1 MR. NELSON: -- as opposed to which State
2 court you would go to.

3 I'm sorry.

4 CHIEF JUSTICE ROBERTS: So if -- could an
5 individual -- you say there is a Federal cause of action
6 in this case apart from the State cause of action that
7 is provided. Could that Federal cause of action be
8 brought in State court even though the State cause of
9 action could not be?

10 MR. NELSON: Mr. Chief Justice, with all due
11 respect, I don't think that this statute creates a,
12 "State cause of action." It creates a Federal --

13 CHIEF JUSTICE ROBERTS: Right.

14 MR. NELSON: -- a Federal cause of action
15 that may be brought in both State and Federal court.

16 CHIEF JUSTICE ROBERTS: Got it, got it. But
17 just to follow up. The cause of action could be brought
18 in both, except if the State courts say it can't be
19 brought there. The State cause of action can't be
20 brought in State court because of this "if otherwise
21 permitted," right?

22 The Federal cause of action, though -- I
23 thought the State courts couldn't discriminate against
24 the Federal cause of action, any Federal cause of
25 action. So you can sue in State court and say: I'm

1 bringing my Federal cause of action, so the fact that
2 you don't permit a State cause of action doesn't bar me.

3 MR. NELSON: Again, I -- I think that the
4 premise of the question is -- is really not correct.
5 The statute does not create --

6 JUSTICE GINSBURG: This goes back to
7 Justice Alito's point. Justice Alito said this claim
8 arises under Federal law; the substantive law that
9 governs is not State law.

10 MR. NELSON: Exactly right, Justice
11 Ginsburg.

12 CHIEF JUSTICE ROBERTS: No, that's fine.
13 That may be exactly right. But the cause of action
14 under subsection (3) asks whether or not this action --
15 it provides an action that can be brought in State court
16 if otherwise permitted, right?

17 MR. NELSON: It provides an action, says
18 that that action may be brought in State court if
19 otherwise permitted. That is the creation of a Federal
20 right of action over which State courts have
21 jurisdiction if their laws otherwise allow. It's not
22 the creation of two causes of action, one State and one
23 Federal.

24 And that's why "if otherwise permitted" may
25 give the States some leeway, maybe more than they would

1 have under *Testa v. Katt*, to exclude them. But it
2 doesn't actually affect the availability of the action
3 in Federal court, Although even if it did, Chief Justice
4 Roberts, in this case there has been no dispute that
5 this action is otherwise permitted by Florida law.

6 CHIEF JUSTICE ROBERTS: What -- what about a
7 diversity action? You could not bring this action in
8 State court because it is contrary to the laws, the
9 rules of the court of that State, but there is
10 diversity. Can you bring that diversity action in
11 Federal court?

12 MR. NELSON: Well, there is a -- there's a
13 split in the circuits over that question at this point.
14 But my answer is yes, because it's -- it's a Federal
15 cause of action governed by substantive Federal law, as
16 the -- as the Second Circuit's opinion in *Gottlieb* held.
17 The implication of that is if there is any basis for
18 jurisdiction, whether diversity or Federal question, you
19 have the right of action in Federal court. And it's not
20 contingent on whether State law allows the -- the right
21 of action.

22 JUSTICE SCALIA: Well, how is that? I mean,
23 the description of the right of action is that it exists
24 only if permitted by the laws or rules of court of a
25 State.

1 MR. NELSON: I think, again, Justice Scalia,
2 that's -- that's a description of the conditions under
3 which it may be brought in State court. It's not --

4 JUSTICE SCALIA: What -- what is a
5 description of the cause of action then?

6 MR. NELSON: The description of the cause of
7 action is that if the statute is violated --

8 JUSTICE SCALIA: Where is it in the statute?
9 I mean -- I'm reading the section --

10 MR. NELSON: It's in --

11 JUSTICE SCALIA: -- that says under
12 "Protection of Subscriber Privacy Rights," subsection
13 (5) is entitled "Private Right of Action," and the only
14 right of action it describes is that a person who has
15 received more than one telephone call -- blah, blah,
16 blah, blah -- may, if otherwise permitted by the laws or
17 rules of the court of a State, bring in an appropriate
18 court of that State actions. Now, even if you say that
19 that cause of action is bringable in Federal court, why
20 wouldn't it be still governed by the laws of a State?

21 MR. NELSON: Well, it -- it goes to the
22 question -- again, back to my answer to Chief Justice
23 Roberts -- of what you consider "if otherwise available"
24 to modify. And to me, I think the most natural reading
25 is that it modifies "may bring in State court," because

1 that is the only thing that it makes sense to have State
2 rules of court affect.

3 JUSTICE SCALIA: That's fine. Then where is
4 the creation of a private right of action bringable in
5 Federal court apart from State laws? Where does that
6 exist in this statute? I don't see it here.

7 MR. NELSON: It's in the section as a whole.
8 I think you are looking at (c)(5). (B)(3) is the one
9 that's actually at issue here, but its -- its phrasing
10 is the same. It's at 10a in the blue brief. And the
11 act that -- the statute as a whole creates an
12 entitlement to bring an action that yields certain
13 recoveries.

14 And, you know, this Court has never looked
15 at statutory provisions that create rights of action and
16 say they may be brought in particular courts -- it
17 hasn't read the reference to "may be brought in the
18 courts" as limiting the right of action. In Tafflin,
19 for example, the RICO statute says you may bring an
20 action in Federal court to recover damages for a
21 violation of that section.

22 CHIEF JUSTICE ROBERTS: Counsel, do you
23 know -- do you know why the Solicitor General is not
24 here defending the proposition that Federal law provides
25 a Federal cause of action that can be brought in Federal

1 court?

2 MR. NELSON: No, I don't know why. They
3 don't tell you, when they are not filing a brief, their
4 reasons why, Mr. Chief Justice. I think --

5 JUSTICE GINSBURG: Do you think it's because
6 the FCC once took the position that the action was
7 limited to State courts?

8 MR. NELSON: No, the FCC has never taken a
9 position that its limited to state courts. They have in
10 a number of things that they have written about the
11 statute said in the words of the statute that an action
12 may be filed in state court. They have never stated one
13 way or another a position on the question of whether it
14 may be filed in the Federal court. In the Charvat case
15 they did file an amicus brief in the Sixth Circuit,
16 taking the position that the right of action created by
17 the statute is in all respects governed by substantive
18 federal law. They didn't say anything one way or
19 another about whether the Sixth Circuit actually had
20 jurisdiction. It would seem kind of odd if they took
21 the view that it didn't, that they wouldn't have
22 mentioned it. But --

23 JUSTICE BREYER: How does it happen that --

24 JUSTICE KENNEDY: Can you clarify one point
25 for me. You indicated that no state has said that you

1 cannot bring an action and yet -- and you said that
2 Texas said it has to be specifically authorized. Did
3 the legislature of Texas specifically authorize -- don't
4 let me misstate what you said.

5 MR. NELSON: It's -- the Texas legislature
6 has enacted statutes that says a plaintiff may go to
7 court and bring an action under the TCPA. In those --
8 in so many words, in addition to whatever right of
9 action it may have under Texas law. If there are no
10 further questions I will reserve the remainder of my
11 time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Nelson. Mr. Garre.

14 ORAL ARGUMENT OF GREGORY G. GARRE

15 ON BEHALF OF THE RESPONDENT

16 MR. GARRE: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 Whether this Court concludes that a
19 12(b)(1) or 12(b)(6) label is the better fit, it should
20 hold that Congress did not intend for private TCPA
21 claims to be brought in Federal court under 28 U.S.C.
22 1331. The private right of action that Congress
23 expressed is distinct in three different and meaningful
24 ways. And if you look at the right of action which is
25 on page --

1 JUSTICE KAGAN: Mr. Garre, you don't contest
2 the background rule do you, which is that when Congress
3 creates a cause of action there is Federal questioned
4 jurisdiction unless Congress does something to divest
5 the Federal courts of that jurisdiction.

6 MR. GARRE: We don't. And we haven't
7 contested that the action here arises under
8 Federal law. But what you've got is a question of
9 interplay between two statutes, 1331 and the private
10 right of action here. In the same way that the court
11 has dealt with the interaction between section 1983 and
12 other private rights of action, for example, the City of
13 Rancho Palos Verdes v. Abrams case. And in that
14 context the court hasn't said oh, if it's covered by
15 1983, of course you got to bring it under -- you can
16 bring it under 1983 unless Congress has unmistakably
17 cleared that you can't.

18 JUSTICE KAGAN: But if you say if you don't
19 contest the background principle then the question is
20 whether Congress has clearly enough divested the Federal
21 courts of jurisdiction over this case essentially by
22 giving jurisdiction to the state courts. And we have
23 had a number of cases going the other way that suggest
24 that you don't divest one court of jurisdiction by
25 giving jurisdiction explicitly to another court. And

1 the question here is why is this any different, and has
2 Congress by granting jurisdiction to one court spoken
3 with the kind of clarity needed to divest the Federal
4 courts of their preexisting jurisdiction?

5 MR. GARRE: In all of those cases dealt with
6 the constitutional presumption of concurrent state court
7 jurisdiction. And of course where the question is
8 whether the Constitution has been displaced this Court
9 has required Congress to speak with unmistakable
10 clarity. This case is the first case where this Court
11 is confronted with the question whether there is any
12 similar presumption going the other way. There is no
13 constitutional foundation for that presumption. It's
14 just the interplay between statutes. And for that
15 reason we think that section 1983 paradigm is more
16 important.

17 JUSTICE KAGAN: But nobody has ever said the
18 Federal question jurisdiction is granted by 1331 is some
19 kind of junior sister when it comes to jurisdiction, is
20 some kind of weaker jurisdictional default provision. I
21 mean once Congress has granted Federal question
22 jurisdiction by 1331, that's the background rule. The
23 Federal courts have jurisdiction, in the same way that
24 the background rule is that the state courts have
25 jurisdiction.

1 MR. GARRE: Well, no. The background
2 rule -- the background -- right. There's a background
3 rule provided by a statute which Congress can displace
4 by later enacting a more specific statute and then there
5 is a background rule provided by the Constitution. And
6 our position is that usually when the court talks about
7 Congress displacing and disrupting the traditional
8 balance of powers protected by the Constitution, it does
9 require Congress to speak with unmistakable clarity.

10 It doesn't apply that kind of presumption
11 when you are talking about an earlier more general
12 statute and a later more specific statute. In fact, in
13 that situation the court's general rule is that the
14 later more specific statute trumps an earlier more
15 general one. And I don't think there is any reason to
16 carve 1331 out as being --

17 JUSTICE GINSBURG: Mr. Garre, do you have
18 any example, other than this statute which is odd, is
19 there any other example of a claim that arises under
20 Federal law as this does under a Federal statute with a
21 substantive law as Federal that one may not bring in
22 state court.

23 MR. GARRE: I can't cite you another
24 example. The Shoshone case is another anomaly. It's a
25 little bite different. But I think the Court should

1 give credit to what Congress did here. And if you look
2 at the right of action, it's distinct in 3 different
3 ways.

4 First, Congress only spoke of bringing suits
5 in state courts. Petitioners identified another Federal
6 cause of action where Congress has done that. Second,
7 Congress modified the entire right of action based on an
8 otherwise permitted by the laws or rules of the court of
9 the state. Under the rules of grammar there is no
10 question that that clause modifies the "may" not
11 anything else that follows in that statute. And the
12 third way its distinct, Justice Ginsburg, is that
13 Congress spoke of the limitations on the state courts in
14 state laws before it even expressed the violation. In
15 the typical way that Congress expresses a private right
16 of action, and I have looked at a lot of them in the
17 last few days, Congress talks about the violation and
18 then it provides a descriptive matter where it can be
19 brought. Here in the first --

20 JUSTICE GINSBURG: Is the law any different,
21 the violation and the governing law any different than
22 if the Attorney General had brought suit or if the FCC
23 sought to enforce this law? Either the substance of the
24 law whoever sues, the Attorney General, the FCC, the
25 Federal law that governs it is the same, isn't it?

1 MR. GARRE: Well, I think there is separate
2 provisions that allow the State attorneys general to go
3 into Federal court and the FCC has its own enforcement
4 authority. They aren't conditioned by this limitation.
5 We are talking about this private right of action.

6 JUSTICE GINSBURG: But are we talking about
7 the claim, the violation, the wrongful conduct is the
8 same whether the Attorney General is suing, whether the
9 FCC is enforcing.

10 MR. GARRE: I think the basic elements of
11 the cause of action are going to be the same but State
12 law can limit the availability of that cause of action,
13 the ability to bring it in a court. And under -- for
14 example, by class action rule or just saying you can't
15 bring those claims at all or statute of limitations.
16 Petitioner's view is that a plaintiff can circumvent
17 those limitations altogether, authorized by Congress in
18 the most important clause of this private right of
19 action simply go into Federal court and be gone with
20 those limitations.

21 JUSTICE GINSBURG: Mr. Garre --

22 JUSTICE SOTOMAYOR: What is the logic of
23 your position? Congress does a whole study about how
24 these harassing calls and e-mails and other things are
25 to citizens, and all of a sudden it's going to limit the

1 rights of those citizens to recover under the act to
2 those states that are going to say, okay, why even
3 bother passing a Federal law if it was going to give
4 states the option to protect against this kind of
5 conduct alone?

6 MR. GARRE: Well it created a public Federal
7 right. Congress all the time creates Federal legal
8 protections that doesn't give -- private right of
9 accesses --

10 JUSTICE SOTOMAYOR: -- Generally it does
11 give -- you just admitted to Justice Ginsburg nowhere
12 else has it created a Federal right with a private cause
13 of action in which it is limiting the protections of the
14 Federal law to those states that decide they want to do
15 it too. I mean, generally Congress creates a Federal
16 right because they don't think the states are doing
17 enough.

18 MR. GARRE: And there is no question that
19 they would have a Federal right. And of course this
20 private right of action is distinct. My point is only
21 that it's not unusual for Congress to create a Federal
22 right and not provide a private right of action. For
23 example, under the provision in *Gonzaga v. Doe* --

24 JUSTICE SOTOMAYOR: Unquestionably. It is
25 unusual for them to create a Federal right with a cause

1 of action and then limit its application to those states
2 that say it's okay. I go back to my question why not
3 simply say to the states, please do something about this
4 problem.

5 MR. GARRE: I think that I would point you
6 to the statutory findings and if you thought it
7 appropriate, to look at Senator Hollings' statement as
8 well. And the reason why it makes sense is that
9 Congress is dealing with a situation that when it acted
10 the vast majority of states had passed laws to allow
11 consumers to deal with this problem at the State level.
12 It identified this interstitial void that Your Honor
13 spoke about in your opinion on the Second Circuit and
14 Congress acted to close that enforcement loophole to
15 authorize states to allow consumers to go after
16 interstate calls.

17 JUSTICE GINSBURG: Mr. Garre, wasn't it
18 really a loophole? What -- if the telemarketers are
19 calling from out of State, but the impact is in the
20 State, the person that is being called, it seems to me
21 that there certainly would be jurisdiction with the out
22 of State tort feasor who is doing something out of State
23 that has its impact that causes the State, and has it's
24 impact.

25 MR. GARRE: I have struggled over that, too,

1 Justice Ginsburg. But the one thing I can say is that
2 Congress perceived that enforcement gap that is
3 identified in the statutory findings reproduced in the
4 addendum here; and Congress you would presume acted to
5 fill the gap that it saw, and it did this by keeping it
6 at the State level, keeping in mind that we're talking
7 about something with an enormous potential for volumes
8 of claims.

9 JUSTICE BREYER: Well, this is the part
10 that's worrying me. On your side it's hard, and it's an
11 unusual statute, but the -- certainly -- and I agree
12 with you that the language of the statute suggesting a
13 kind of reverse preemption, something like that, and
14 certainly Senator Hollings' comment, and certainly the
15 fact that they specifically provide for an attorney
16 general to bring an action in the State court, suggests
17 that they wanted the smaller private actions in State --
18 I mean, in Federal court -- in State court; that favors
19 you.

20 All right. But then I thought as you were
21 speaking, what about diversity jurisdiction? And -- and
22 I don't see why there wouldn't diversity jurisdiction in
23 terms of trying to get these out-of-State people. And
24 if there is diversity jurisdiction, why in heaven's name
25 would they want to say but there is no "arising under"

1 jurisdiction?

2 MR. GARRE: Well --

3 JUSTICE BREYER: So I am -- so I am pushed
4 the other way by that. So -- so what do you think?
5 What do you think?

6 MR. GARRE: Well, ultimately all of the
7 Federal circuits that have grappled with this problem
8 have concluded that recognizing diversity jurisdiction
9 is not fundamentally incompatible with saying there's no
10 Federal question jurisdiction, for a couple of reasons.

11 JUSTICE BREYER: I know. But why, if you
12 were sitting in Congress and somebody did tell you --
13 Senator Hollings apparently never thought of this, but
14 say to Senator Hollings: Senator, there will be
15 diversity jurisdiction here. And he, when he thinks
16 about it, says: Hey great, that's wonderful, because
17 these people are all in State A and they are phoning
18 people in State B.

19 Now, if that was his reaction, then someone
20 would say: What about "arising under" jurisdiction?
21 And what I'm thinking is, if I imaginatively put myself
22 in his position, I think, heh, why not?

23 MR. GARRE: For two reasons, Justice Breyer.

24 JUSTICE BREYER: Why?

25 MR. GARRE: The first is amount in

1 controversy. Diversity has an amount in controversy
2 requirement of \$75,000, which makes it more likely where
3 a plaintiff has that it would be a situation where it
4 would incur the costs of an attorney and other expenses
5 to go into Federal court. Federal question has no
6 amount in controversy after 19 --

7 JUSTICE BREYER: That's true. The "flooding
8 the courts" problem.

9 MR. GARRE: Exactly, and the amount in
10 controversy checks that.

11 The second reason is that, to the extent
12 that Congress created this unique Federal right and
13 intended it to behave like State laws, as Judge
14 Calabresi describes it on the Second Circuit, then it's
15 more natural to think of diversity jurisdiction allowing
16 the Federal courts to entertain what is in effect a
17 State cause of action than it would be for Federal
18 question jurisdiction where you have the anomalous
19 situation of someone going into Federal court and
20 saying: I'm not bound by the State law limitations, for
21 example, the limitation on the class action, because I
22 can bring this Federal private right of action under
23 Federal question for \$500 wherever it is. I mean --

24 JUSTICE GINSBURG: How about supplemental
25 jurisdiction? It says it doesn't have the amount in

1 controversy.

2 MR. GARRE: We would put that in the same
3 category of diversity, which is to say -- I mean,
4 ultimately, I think it -- particularly if you look at
5 this as the private right of action, Congress did not
6 express a private right of action for someone to go into
7 Federal court here. If this Court looked at it through
8 the lens of its private right of action jurisprudence,
9 the Court would say, I would think, you did not confer a
10 private right of action to go into Federal court in the
11 unique way that you express it here.

12 If the question was, if this private right
13 of action said you can sue an in-State company and the
14 plaintiff came here saying, well, it says in-State but
15 they didn't say you can't sue an out-of-State, this
16 Court would say: No, Congress said in-State; we --
17 that's the private right of action it created.

18 JUSTICE GINSBURG: But Congress -- Congress
19 also -- it made -- for attorney general suits it said:
20 And Federal court jurisdiction is exclusive. So it's
21 given Federal court exclusive jurisdiction to adjudicate
22 this claim, because the claim as you have -- I think as
23 you recognize, is the same whether it's brought by the
24 FCC, the attorney general or private. So if you use the
25 word "exclusive" there, there's nothing in this private

1 right of action about the State courts being exclusive.

2 MR. GARRE: And I think on that -- first, it
3 makes sense that they would authorize Federal
4 jurisdiction for the State attorney generals' actions
5 because they authorized the FCC to intervene there. It
6 also makes sense that they said "exclusive" there
7 because there they were dealing with the constitutional
8 presumption that State courts have concurrent
9 jurisdiction unless Congress affirmatively says they
10 don't. This Court had decided Tafflin a year earlier,
11 and so it -- to give Congress its due, it would make
12 sense if you presume they are aware of this Court's
13 decisions, that it would say "exclusive" there. The
14 constitutional --

15 JUSTICE ALITO: You -- you seem to be
16 arguing for a three-tier standard for displacing
17 jurisdiction. So if Congress wants to make a Federal
18 claim cognizable only in Federal court it has to be
19 very, very clear. If it wants to displace diversity
20 jurisdiction, it doesn't have to be that clear, but
21 maybe it has to be certain -- clear to a certain degree.
22 If it wants to displace Federal question jurisdiction,
23 it doesn't have to be nearly as clear.

24 MR. GARRE: But we're not -- we're certainly
25 not arguing for a distinction between diversity and

1 Federal question. And ultimately if pushed we would
2 take the position that because Congress was clear it
3 wasn't authorizing suit in Federal court, we think
4 diversity should go, too.

5 My response to Justice Breyer was that it --
6 it's a closer call because of the -- the amount in
7 controversy and the extent to which Congress created a
8 right --

9 JUSTICE SCALIA: When there is suit in
10 Federal court, let's say these attorney general suits,
11 what are the suit -- what is the suit governed by? Is
12 it governed by State law?

13 MR. GARRE: I think it would be governed by
14 Federal law. I think to the extent there's a --

15 JUSTICE SCALIA: Well, I mean, I -- Federal
16 law mirroring State law?

17 MR. GARRE: No, because the -- the public
18 right of action isn't conditioned the same way that the
19 private right of action is. And --

20 JUSTICE SCALIA: Well, it's the authority to
21 enforce, right?

22 MR. GARRE: If you look at the public right
23 of action --

24 JUSTICE SCALIA: Civil actions brought under
25 the subsection.

1 MR. GARRE: Right. The public right of
2 action isn't brought under (b)(3), which is a private
3 right of action, and the anomalies arise when you think
4 of allowing these claims in Federal court --

5 JUSTICE SCALIA: So you have a different --
6 a different -- a different law applied if -- and the
7 State law limitations don't apply if it's a suit in --
8 in Federal court by -- by an attorney general?

9 MR. GARRE: The State law limitations apply
10 to the private right of action. That Congress didn't
11 say, here is the Federal --

12 JUSTICE SCALIA: I mean, it is so weird. I
13 can't understand that.

14 MR. GARRE: But, Your Honor, it's only weird
15 if you say they can bring the private right of action in
16 Federal court. If you say that Congress meant these to
17 be limited to State court it makes perfect sense.
18 Congress was making clear: States, you have authority
19 to address this problem; you can address it under your
20 own law.

21 JUSTICE KAGAN: I think, Mr. Garre, what
22 Justice Ginsburg and Justice Alito were suggesting, is
23 that this is a momentous thing for Congress to do to, to
24 deprive the Federal courts of jurisdiction over a cause
25 of action that has been created by Congress and a cause

1 of action that has Federal law as the rule of decision.
2 The usual presumption is that of course Federal courts
3 have jurisdiction over those matters under section 1331.

4 And this is one peculiar way of divesting
5 those Federal courts of jurisdiction. Obviously
6 Congress knew how to right an exclusive jurisdiction
7 statute. It didn't here. So why should we give
8 Congress the benefit of the doubt and sort of say, well,
9 Congress must have had something else in mind, even
10 though Congress didn't articulate that?

11 MR. GARRE: And if Congress has to say
12 exclusive, then we lose. I'm not arguing otherwise.
13 But I think our position is, is what Congress did here
14 was unmistakably different and clear enough. And the
15 flip side of what you've just said is to say that
16 Congress meant nothing when it went out of its way to
17 create what all agree is an extraordinarily unique
18 private right of action.

19 JUSTICE KAGAN: No, I don't think that's
20 right because this is not superfluous, because of the
21 that provision that, you know, the Testa provision which
22 says that State courts don't have to entertain this
23 cause of action. So in the usual case State courts
24 would have to entertain this cause of action. Here
25 Congress is saying, no if they feel as though that would

1 deluge State courts, they have an out.

2 MR. GARRE: And if Congress had intended
3 that, Your Honor, I think the more natural way for it to
4 have said would -- would have been something like in an
5 action brought in State court it may be limited by the
6 laws and rules of that court. Here Congress cabined the
7 entire right of action: "may" comma -- subordinate
8 clause which modifies the "may." There's just -- in any
9 other case I think, Your Honor, the Court would read the
10 "if otherwise permitted" clause as modifying the "may"
11 and therefore the entire right of action.

12 JUSTICE SCALIA: Can Congress create a
13 Federal -- can Congress in effect delegate to the States
14 the contours of a -- a Federal cause of action? I mean,
15 you keep talking about it as a Federal cause of action.

16 MR. GARRE: I think --

17 JUSTICE SCALIA: But it's not really, if --
18 if its existence or non-existence depends upon State
19 law; or at least it depends upon State law you say if
20 it's brought in State courts; however if it's brought in
21 Federal court by the Attorney General, you have a
22 totally different law applying, a Federal law.

23 MR. GARRE: In the Shoshone case Congress
24 created a right of action whose content was -- - was
25 supplied by State law. So --

1 JUSTICE KENNEDY: In which case?

2 MR. GARRE: The Shoshone Mining case.

3 It's -- it's cited in our brief.

4 JUSTICE KAGAN: But that's not this case.

5 MR. GARRE: No, no -- but -- we are not
6 saying that this case is -- with that case, but I think
7 it's an example where -- where State law would -- would
8 fill the content of the Federal right.

9 JUSTICE BREYER: Well, why wouldn't the --
10 the problem that Justice Scalia just identified or we
11 were talking about suggests actually favor their side,
12 that that inconformity to the State law is talking about
13 procedure.

14 I mean, imagine that the State law has a
15 2-year limitation period or a 1 year. You see, I don't
16 know what the limitation period is here, it may be
17 longer. So what happens is where you go into -- the
18 attorney general brings the action, you are going to say
19 it's 4 years but if it's in a State court and a private
20 person it would be 1 year? That doesn't seem to make
21 sense.

22 It then seems to make sense if you interpret
23 that provision as saying what court you could go into in
24 the State. If the State permits you to go to the
25 Superior Court or the Small Claims Court or in other

1 words, procedural rules.

2 MR. GARRE: But if Congress didn't just say
3 procedure, it said laws or rules of --

4 JUSTICE BREYER: It did, but look what --
5 how do you get out of the mess then, what happens when
6 the State attorney general brings an action in a Federal
7 court, as he is permitted to do? What statute of
8 limitation or substantive rule do you apply?

9 MR. GARRE: It would be the general 4-year
10 Federal statute of limitations. I mean, the way --

11 JUSTICE BREYER: That's now really odd,
12 because we are then going to get different statutes of
13 limitations, depending upon whether a State attorney
14 general or an individual --

15 MR. GARRE: But it's not odd if you give
16 effect to the language of (b)(3), which in a effect says
17 we are going to leave this up to the States. Congress
18 contemplated through this language that there could be
19 50 different rules about how private TCPA claims would
20 be brought in State court. I think that is undisputed.

21 The question is whether or not you --
22 plaintiffs can just say I want out of that and go into
23 Federal court, and conversely whether defendant could
24 remove any claim brought in State court into Federal
25 court.

1 CHIEF JUSTICE ROBERTS: I'm having trouble,
2 Mr. Garre, figuring out what exactly is at issue here.
3 It seems to me that there is two possible views on it.
4 First is, is there Federal jurisdiction over one of
5 these actions; the second of all is, is there a private
6 right of action apart from the one that can be brought
7 under subsection (b)(3), which is one in State court?

8 MR. GARRE: Right.

9 CHIEF JUSTICE ROBERTS: Now, which -- which
10 are we supposed to decide? I can see the Federal
11 question jurisdiction issue being straightforward.
12 Federal law creates this cause of action, therefore, you
13 can say that it is under 1331 there is jurisdiction, but
14 then you can't do anything once you are in Federal court
15 because the private right of action is limited to State
16 court.

17 MR. GARRE: And our position is ultimately
18 both are at issue, certainly the focus of this case has
19 been on the jurisdictional question, which is the
20 12(b)(1), but if the Court thinks that there is Federal
21 jurisdiction, then it should say that the Federal cause
22 of action fails under 12(b)(6), because both arguments
23 are based on the same exact statutory language.

24 This Court has recognized, for example, in
25 the Merrell Dow Pharmaceuticals case that the

1 availability of a private right of action intersects
2 with jurisdiction. The Court recognized the same point
3 in National Passengers Association case, 414 U.S. 453.

4 JUSTICE GINSBURG: Let's go back to the --
5 this -- this claim, unlike the Shoshone Mining, this
6 claim arises under Federal law. No question about it.

7 MR. GARRE: We don't dispute that, Your
8 Honor.

9 JUSTICE GINSBURG: Okay. So if Federal law
10 creates the cause of action and when Federal law creates
11 the cause of action, the rule has always been there the
12 1331 jurisdiction.

13 MR. GARRE: Unless a later enacted statute
14 precludes that rule. And here the later enacted statute
15 doesn't win it.

16 JUSTICE GINSBURG: But the later enacted
17 statute doesn't say the Federal law no longer creates
18 the cause of action.

19 MR. GARRE: The later enacted statute
20 creates the cause of action -- 1331 doesn't create a
21 cause of action. It's jurisdictional only. They need
22 to have a call to action.

23 JUSTICE GINSBURG: They have jurisdiction
24 when Federal law creates a cause of action.

25 MR. GARRE: Unless it has been displaced by

1 a later enacted provision. And I --

2 JUSTICE KAGAN: Mr. Garre, do you have any
3 examples of that, places where we've said Congress has
4 divested the court of Federal question jurisdiction and
5 by what means?

6 MR. GARRE: I don't have an example in 1331.
7 I have do have section 1983, which I think is the
8 perfect parallel, because there you have got a
9 venerable, general provision, section 1983, which is
10 actually older than 1331. And the question comes along
11 from time to time whether a later enacted Federal right
12 can be enforced through 1983. And the Court in that
13 context says although we generally presume that you can
14 go through 1983, if there is a later enacted specific
15 enforcement mechanism, we give the facts of that --

16 JUSTICE KAGAN: And how specific does it
17 have to be? I mean, how vague are we willing to go here
18 and say, okay, Congress has done a good enough job,
19 because somehow we have some idea that they wanted these
20 cases to end up in small claims court?

21 MR. GARRE: I think if you look at the City
22 of Rancho Palos Verdes case, which I would encourage you
23 to look at, I think it doesn't have to be nearly as
24 specific as my friend is claiming. I think if you look
25 at all signposts of congressional intent, here you have

1 got a language which is unmistakably distinctive, State
2 law, State court focused, you have got a structure of an
3 act where Congress, when it wants concurrent
4 jurisdiction or Federal jurisdiction, it says so,
5 provides the rule for venue and what not.

6 You have got legislative statutory findings
7 indicating that Congress both was aware of the vast
8 volumes of calls which could create potential claims,
9 wanting to address a particular problem of an
10 enforcement gap at the State level. And then if you
11 choose to look at it, you have the legislative history
12 of the sponsor of this very unusual provision saying --

13 JUSTICE GINSBURG: And Congress speaks of
14 Federal claim, it usually doesn't. I mean, the
15 assumption is that it's going to be concurrent
16 jurisdiction.

17 MR. GARRE: Yes, and we're not -- I mean,
18 the question is whether or not that assumption should be
19 displaced here, and we're saying that Congress's
20 expressions of intent displace it here. And again I
21 think if Petitioner --

22 JUSTICE GINSBURG: Can we go back to the
23 1983 example, which I was thinking about that, and it's
24 a later specific statute is another Federal statute.
25 You have -- Congress has another Federal statute that

1 makes it more a general 1983 map available because you
2 have a more specific Federal statute.

3 MR. GARRE: And I think that's why the
4 parallel seems apt to us here. You -- instead of
5 dealing with Congress displacing case -- State court
6 jurisdiction with constitutional presumption, you have
7 an earlier enacted Federal statute 1331, and the later
8 are enacted statute, the TCPA private right of action
9 here.

10 JUSTICE SCALIA: Yes, but the difference is
11 that the 1983 cases don't deal with what this deals
12 with, which is displacement of the jurisdiction of
13 Federal courts. And we are jealous of our jurisdiction,
14 not only in the constitutional cases that you refer to,
15 but in all cases.

16 And I had thought the general rule that you
17 have to be clear when you take cases out of the Federal
18 courts, I thought that that applies not just where
19 you're dealing with a constitutional jurisdiction, but
20 also where you are dealing with already conferred
21 statutory jurisdiction. And why shouldn't I apply that
22 presumption?

23 MR. GARRE: But I think this Court has a
24 more generous attitude towards sessions 1983. And I
25 think in your opinion with Rancho Palos Verdes case, you

1 spoke of a rebuttable presumption that Congress doesn't
2 mean to -- to displace section 1983, but yet you found
3 it there because of a specific enforcement mechanism. I
4 think the enforcement mechanism here is much more
5 specific and meaningful than even the one in the Rancho
6 Palos Verdes --

7 JUSTICE SCALIA: How do you deal with the
8 jurisdiction of Federal courts? That's what gets our
9 hackles up --

10 MR. GARRE: It did not --

11 JUSTICE SCALIA: -- when you are telling us
12 we have been ousted of jurisdiction.

13 MR. GARRE: It did not --

14 JUSTICE SCALIA: We don't like that.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Counsel, I -- we
17 have been talking about where this provision fits,
18 basically, into our general jurisprudence in this area.
19 But I have never seen a statute remotely like this
20 before. Is there any one, where you have a Federal --
21 where you have Congress creating a cause of action that
22 can be brought in State courts unless the State court
23 says it can't, saying nothing at all whether there is a
24 Federal cause of action? This is the strangest statute
25 I have ever seen.

1 MR. GARRE: We totally agree, but I think
2 the important point from our perspective is either
3 Congress meant what it said, and this Court should give
4 effect to what it said in its very distinct and unusual
5 way, or it's rendered, you know, largely meaningless,
6 except in the most generalized sense, because a
7 Petitioner's right you can bring a claim in State or
8 Federal court. The claim that you bring in Federal
9 court is in no way limited -- limited by the laws or
10 rules of a State court. And all of the stuff that
11 Congress said about the State courts and the State law
12 focused language at the very beginning of its cause of
13 action is meaningless, because Congress didn't have to
14 say any of this to authorize people to go into State
15 court under concurrent jurisdiction conferred by the
16 Constitution.

17 And our position is, is that this Court
18 should give effect to the words in the private right of
19 action, distinct as it is that Congress created, and
20 hold that Congress did not intend for plaintiffs to be
21 able to bring -- to circumvent these limitations by
22 going into Federal court under 1331.

23 JUSTICE SOTOMAYOR: Could you tell me why
24 you seem to be taking somewhat contradictory positions,
25 you seem to be conceding that this is not a Federal

1 subject matter jurisdiction issue, but the scope of the
2 cause of action that was created. The judgment was on
3 the basis of lack of Federal subject matter
4 jurisdiction. Aren't you trying to alter the judgment
5 and didn't you need to cross petition to do that?

6 MR. GARRE: Well, I probably wasn't clear on
7 that, Justice Sotomayor. Our position is that
8 ultimately there is no Federal question jurisdiction.
9 That although it arises under 1331, the specific
10 provision here was never intended to be enforced under
11 1331, and instead was only authorizing State courts.

12 JUSTICE SOTOMAYOR: So you are saying a
13 State court, if it chose, say, we are going to award
14 actual damages not the \$500 statutory --

15 MR. GARRE: No, I don't think the State
16 could actually alter what Congress said. It can -- it
17 can alter, as Congress said, the ability to bring a
18 right of action.

19 Now, I do think this Court could affirm --

20 JUSTICE SOTOMAYOR: But it can. It can
21 choose not to enforce that Federal right of action.

22 MR. GARRE: And in that case, a private
23 citizen would go to a State attorney general and say
24 bring this action on behalf, or go to the FCC and bring
25 an enforcement action. There are public rights --

1 public ways to enforce that.

2 Just -- just to be clear, we think this
3 Court could affirm on the alternative ground of
4 12(b)(6), that there is Federal question jurisdiction
5 that this private right of action doesn't confer a right
6 to go into Federal court. My friend has said that that
7 position has been waived. Under 12(h) of the Federal
8 Rules of Civil Procedure, we haven't waived 12(b)(6); we
9 just haven't asserted yet.

10 It is clear that Federal courts can convert
11 12(d)(1) motions into 12(b)(6) motions, and there'd be
12 no reason for this Court to remand simply for us to
13 assert a 12(b)(6) -- put a 12(b)(6) label on the same
14 position that we would be back before the courts
15 arguing, transforming judicial review into something
16 close to a --

17 JUSTICE ALITO: Isn't this the oddest
18 creature that -- that's ever been seen, a cause of
19 action created by Congress that is not a claim arising
20 under Federal law? That's what you would be saying.

21 MR. GARRE: No, it would be a claim arising
22 under Federal law without a private right to bring it in
23 Federal court. And it would be odd, Your Honor, and our
24 position -- we agree with our friends -- that this is an
25 odd statutory provision. We ask this Court to give

1 effect to its language, which both sides agree is odd,
2 but we think points to the conclusion that Congress
3 meant for these claims to be brought in State court and
4 not in Federal court under Federal question
5 jurisdiction.

6 JUSTICE KAGAN: But I guess that's the
7 question, Mr. Garre. Both sides agree it's odd, and all
8 nine justices agree it's odd. I mean, I think we can
9 say that this statute is odd. And the question is,
10 where do we go from there? And where -- you know, what
11 is the default position? If it's odd and we can't
12 figure it out, the default position seems to be federal
13 courts have jurisdiction over Federal questions.

14 MR. GARRE: But I think that that
15 deprives -- yes, it's odd, but it's odd in a way that
16 one must presume that Congress actually meant what --
17 what it was doing in several different ways here. I
18 think it gets to a point where you just can't presume
19 that Congress didn't mean the impact of its words here.
20 So we would urge this Court to give effect to them.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. GARRE: Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Mr. Nelson, you have
24 4 minutes remaining.

25 REBUTTAL ARGUMENT OF SCOTT L. NELSON

1 ON BEHALF OF THE PETITIONER

2 MR. NELSON: I want to start where Justice
3 Kagan left off, which is the presumption of the
4 existence of Federal jurisdiction unless Congress
5 affirmatively displaces it.

6 My friend suggested that that may not apply
7 or may not apply as strongly when we are talking about
8 Federal statutory jurisdiction, and specifically 1331.
9 But this Court's decision in Colorado River, cited in
10 our reply brief, says exactly the opposite: that a
11 subsequent more-specific Federal statute does not
12 displace the general grant of Federal jurisdiction under
13 1331, absent -- absent some clearer indication than the
14 mere existence of an optional State court jurisdiction
15 over the claim.

16 As to the oddness of the statute, a point on
17 which we all seem to now agree, the point I would make
18 there is, I think that Respondent's position makes this
19 statute even odder, because it suggests that somehow
20 "may" means it may only be brought in Federal court, yet
21 it doesn't mean it may only be brought in Federal court
22 if there is diversity or 1367.

23 But as Judge Easterbrook said in Brill, if
24 "may" really means "may" only, then it wipes out
25 diversity and -- and 1367 as well.

1 CHIEF JUSTICE ROBERTS: Are you arguing only
2 about the rising under jurisdiction or are you arguing
3 also about a Federal cause of action that can be brought
4 in Federal court? In other words, I am trying to figure
5 out what we are being asked to decide in this odd case.
6 I understand the idea -- and I'm sorry to take up your
7 time -- I understand the idea that this is a Federal
8 question because it's created by a Federal law.

9 Can you go -- get into Federal court and
10 then we will have another case about whether you can
11 bring a cause of action there?

12 MR. NELSON: Well, I certainly hope not,
13 Your Honor. I mean, I think if you look at what the
14 question presented is and what the judgment below is,
15 it's a question of subject matter jurisdiction, a
16 12(b)(1) dismissal and a question presented as to the
17 existence of 1331. But, you know, our point is not to
18 get people into Federal court so they can be told they
19 have no right of action. And the answer to that point
20 is that the reference to State courts in the provision
21 is not a limitation on the right to recovery.

22 Congress often actually creates rights of
23 action that refer to a particular court. It's -- it's
24 the Federal court in -- in every case but this one. But
25 as in RICO, as in the Carmack Amendment that was the

1 subject of the 1912 case of Galveston, Harrisburg, and
2 San Antonio Railway cited in our briefs, where the
3 Carmack Amendment said that persons damaged might make
4 complaint in any circuit or district court of the United
5 States. And the Communications Act provisions that we
6 cite on page 10 of our reply say people have certain
7 rights to recover, and they may bring them in Federal
8 court.

9 But those references to the courts have
10 never been considered to be a limit on the right of
11 action. Creating the ability to go into court and
12 obtain a recovery creates a right of action, and it's
13 transitory; it can be brought in any court of competent
14 jurisdiction. And the reference in the statute to a
15 court that has jurisdiction over it does not mean that
16 the -- that the cause of action somehow does not exist
17 outside of that court.

18 The cause of action exists, and the question
19 is, is whether there is a jurisdictional basis. And
20 that's practically at this point I think been conceded,
21 that this statute arises under Federal law. And there
22 is really no indication whatsoever that merely by saying
23 "may be brought in State court," that Congress intended
24 to displace Federal jurisdiction or to create a right of
25 action that uniquely among federal rights of action is

1 only available in State court.

2 Now, it's true "may" or "if otherwise
3 permitted," as my friend said modifies "may," but it
4 doesn't just modify "may" in isolation. It's may what?
5 "May if otherwise permitted bring an action in State
6 court." So the "if otherwise permitted" modifies the
7 conditions on which the action may be brought in State
8 court. But it makes no sense whatsoever to import State
9 court rules into whether the action is available in a
10 Federal court.

11 Now --

12 JUSTICE SCALIA: Except that that's the only
13 section that creates a private right of action.

14 MR. NELSON: That's right. The private
15 right of action is created, but the private right of
16 action is not contingent on that "if." It's the ability
17 to bring it in State court.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 12:04 p.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

A				
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